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In The
Supreme Court of the United States
October Term, 1995

LEROY HENDRICKS,
Petitioner,
v.

STATE OF KANSAS,
Respondent.

On Conditional Cross-Petition for a Writ of Certiorari
to the Supreme Court of the State of Kansas

MEMORANDUM FOR RESPONDENT

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The Conditional Cross-Petition filed by Leroy Hendricks asks the Court to consider three additional constitutional objections to the Kansas Sexually Violent Predator Act, Kan. Stat. Ann. §§ 59-29a01 through 59-29a11, if the Court grants the State's Petition for review of the Kansas Supreme Court's invalidation of the Act on substantive due process grounds, *Kansas v. Hendricks*, No. 95-1649 ("Kans. Pet").

These three additional objections -- grounded on theories of double jeopardy, ex post facto legislation and denial of equal protection -- were raised in the Kansas Supreme Court but not considered in the majority opinion. They were, however, all discussed at some length and rejected in the opinion of the three

dissenting justices (Kans. Pet. App. 24a-59a). Additionally, the opinion of the concurring justice (Kans. Pet. App. 20a-24a) relied to some extent on a federal district court decision holding that the similar Washington statute violates the ex post facto and double jeopardy clauses as well as denying substantive due process.[1]

Under these circumstances, it would be appropriate for the Court to deal also with these additional objections in the event it grants the State's Petition, as it should. As that Petition and the brief for thirty-five states and territories as *amici curiae* in No. 95-1649 urge, the public safety and liberty interests at stake call for a prompt determination of the constitutionality of the Kansas Act and similar statutes enacted or under consideration in other states. That end would be served by disposing of these other objections as well at this time. The State would argue, as does the dissent below, that the double jeopardy and ex post facto objections are inconsistent with *Allen v. Illinois*, 478 U.S. 364 (1986), which holds that civil commitment of a sexual predator is not "criminal" within the meaning of

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[1] *Young v. Weston*, 898 F. Supp. 744, *appeal pending*, 9th Cir. No. 95-35958 (argued March 7, 1996). The Washington Supreme Court took the opposite position in *In re Young*, 122 Wash. 2d 1, 857 P.2d 989 (1993).

Similar double jeopardy and ex post facto issues are raised by the two pending petitions seeking review of the Wisconsin Supreme Court's upholding of that State's similar Sexually Dangerous Persons Act. *Post & Oldakowski v. Wisconsin*, No. 95-8204; *Schmidt v. Wisconsin*, No. 95-8131.

the guarantee against self-incrimination. The State would argue, further, that the equal protection objection rises or falls with the substantive due process objection that is the subject of No. 95-1649.

Accordingly, the State of Kansas does not oppose the granting of the Conditional Cross-Petition in the event the Court grants the Petition of the State of Kansas in No. 95-1649.[2] The State thus waives any formal response to the Conditional Cross-Petition.

Respectfully submitted,

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[2] If the Cross-Petition were granted, the State would request that the two cases be separately briefed and argued in order to allow sufficient space to brief the additional issues and sufficient argument time to respond to the Court's concerns.